Parliamentary Immunity – A Living Fossil?

Gastautor 2016-04-04T09:00:02

von MATTHIAS FRIEHE

The flash lights of the mass media guarantee us parliamentary transparency, but they also inevitably transform the plenary into a stage and MPs into heroes and villains. When the German Green Party politician Volker Beck lost a package containing a suspicious substance during police checks on the evening of 2 March this year – probably the synthetic drug known as "Crystal Meth" – his role was at the crossroads: Is he a covert evildoer or a hero with pardonable human weaknesses? Right from the beginning, Beck's behaviour was a textbook example of crisis management: He didn't even try to avoid the police checks by falling back on his privileges as an MP. His prompt resignation from his position as parliamentary group spokesperson should have been sacrifice enough to assuage public opinion and safeguard his seat in Parliament.

Bundestag President Norbert Lammert could therefore have chosen a more obvious occasion for his claim to abolish the concept of parliamentary immunity. Ironically, Lammert started by triggering a second wave of media articles on the Beck Affair by prolonging the standard procedure for waiving German MPs' immunity in Beck's case, as he found the documents provided by the Berlin Public Prosecutor to be insufficient. Later, he told a Berlin newspaper that parliamentary immunity was not a privilege for MPs, but a disadvantage leading public opinion to come to rash conclusions. Lammert loves to play the uncomfortable companion.

"We'll only leave at bayonet point."

He also loves to be part of the avant-garde. However, in this case, he isn't. Questioning the concept of parliamentary immunity is anything but a new story. Early in the 1950s, the doctrine had already emerged that, in terms of its origins, it is an anachronism to enshrine parliamentary immunity in the Basic Law (the German

Constitution *Grundgesetz*). As in many other European countries (see synopsis), the German concept of parliamentary immunity was inspired by the French tradition. The prevalent notions are confusing. "*Immunité parlementaire*" is the general term used in French to cover two different concepts: Firstly, it encompasses the principle that MPs are not to be held liable outside Parliament for what they say or how they vote in Parliament (freedom of speech; French: "*irresponsabilité*"; German: "*Indemnität*"). Secondly, MPs may not be called to account or arrested for any punishable offence without prior approval by Parliament (parliamentary immunity, French: "*inviolabilité*"; German: "*Immunität*").

Whereas the principle of freedom of speech is part and parcel of the Parliamentary Privilege in Westminster systems too, parliamentary immunity is unique to the French tradition. It is an outcome of the Revolutionary days of June 1789. On 17 June of that year, the *États généraux* declared themselves "*Assemblée nationale*". This was followed on 20 June by the famous "Tennis Court Oath", where the deputies swore never to separate until a Constitution had been established. When King Louis XVI threatened the Assemblée that clergy and nobles may not convene together with the deputies of the "*Tiers état*", the Assemblée insisted on 23 June that "*la Nation assemblée ne peut recevoir d'ordres*" ("the assembled Nation does not take orders"). Count Mirabeau added the famous "*Nous ne quitterons nos places que par la force des baïonnettes.*" On that very same day, the Assemblée adopted a declaration stipulating that "*la personne de chaque député est inviolable*" ("each Member has personal immunity").

The Nazi Terror

The purpose of parliamentary immunity was to safeguard Parliament's autonomy vis-à-vis the Monarch, who not only controlled the executive but also held judicial power during that time. This idea applied to many of the constitutional monarchies which were established in the aftermath of the French Revolution. Parliamentary immunity was not only granted by the French Constitution of 1791 (Chapter 1, Sect. 5, Art. 8), but also by some constitutions in southern German principalities, by the abortive Frankfurt Constitution *(Paulskirchenverfassung)* of 1849 (§ 117), and later by the Constitution for the German Reich of 1871 (Art. 31).

The semi-presidential system established by Germany's post-War Constitution of 1919 raised the first questions about the legitimacy of parliamentary immunity (Art. 37). After World War II, Germany was transformed into a parliamentary democracy. In theory, the major argument in favour of parliamentary immunity no longer applied because dualism between Parliament and the Government was replaced by dualism between the majority in Parliament which supports the Government, on the one hand, and the parliamentary opposition on the other. While MPs belonging to the majority should not need to fear unfair interference from their "own" government, opposition MPs remain practically unprotected since parliamentary immunity has never been understood other than subject to majority vote. In practice, abolishing parliamentary immunity was out of the question after the bitter experience with Nazi Terror directed against Social Democrat and Communist Members (see Art. 46 of the Basic Law).

Long live parliamentary immunity!

I would like to present three arguments as to why the concept of parliamentary immunity also finds its justification in parliamentary democracies, and why it should not be misunderstood as constituting general mistrust of the application of the rule of law.

First of all, it is obvious that politicians are more likely to be threatened by groundless investigations than other people. This was clearly manifest when poor evidence, in addition to public sensation, unprofessional crisis management and highly-motivated prosecutors brought former Federal President Wulff before a criminal tribunal, which was unable to establish any criminal offense. We should also remember the case of Ronald Pofalla, whose parliamentary immunity was waived for groundless charges of tax evasion in 2000 (see also BVerfGE 104, 310). A house search took place only three days before the elections were held in North Rhine-Westphalia, where Pofalla was set to become Minister of Justice in case of a likely election victory of the Christian Democratic Party – then missed by only three percent! Both examples show that groundless criminal charges against politicians remain a dark cloud hanging over the fairness of political processes.

The second argument demonstrates that it is completely illogical in parliamentary democracies in particular to substitute the requirement of *prior* approval for investigative measures by a parliamentary reserve to suspend them. This is what Lammert suggested. But since the parliamentary minority cannot prevent the immunity of one of its members being lifted, the protection provided by parliamentary immunity no longer lies in the decision itself, but in the procedure. The requirement of prior approval ensures that prosecutors need to justify the legitimacy of their investigations. This should avoid at least manifestly ill-founded investigations. Moreover, the prefix of this parliamentary procedure should not be inversed. If Parliament's power is restricted to suspending investigations, any such attempt must seem illegitimate from the outset. It is hardly possible for a parliamentary group to request the suspension of pending criminal proceedings without risking a PR disaster for seeking undue privileges.

The third argument shifts the focus from the protection of MPs, and onto the legitimating power of parliamentary debate with regard to well-founded investigations against MPs. On 20 March 2014, the Bundestag discussed the case of two MPs from the "*Linke*" Party against whom investigations were pending for attending a sit-in to protest at an approved neo-Nazi demonstration (see record, pp. 1813A to 1816C). The "*Linke*" Party claimed that this was legitimate civil resistance and should not be seen as a criminal offense. It was interesting to see that – with only one dissention – even the Green Party voted in favour of waiving immunity, even though acts of civil resistance can be regarded as the "cradle" of Germany's Green Party. In my opinion, one must not underestimate the legitimating power of such parliamentary debates. The broad consensus among the Bundestag, namely that MPs are not exempt from the boundaries placed on them by criminal law for their "civil actions", refutes allegations that the police are conducting investigations for political motives in such cases.

So long live parliamentary immunity!
